

**Workplace Safety and Insurance  
Appeals Tribunal**

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**Tribunal d'appel de la sécurité professionnelle  
et de l'assurance contre les accidents du travail**

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**Workplace Safety and Insurance Appeals Tribunal  
Quarterly Production and Activity Report  
October 1 to December 31, 2010**

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## Production Summary

- At the end of the fourth quarter 2010, the active inventory totalled 3,869. This represents the ninth consecutive quarter where the level has remained relatively stable. During this period, the inventory has fluctuated very little (+/- 5%) as compared with its current level.
- Incoming appeals numbered 1007; of these 899 were appeals from WSIB decisions, and 108 appellants advised they were ready to proceed to hearing following a period of inactive status.
  - This compares to 866 new appeals and 132 reactivated appeals recorded in the third quarter of 2010.
  - In the fourth quarter of 2009, the Tribunal recorded 807 new appeals and 138 reactivations.
  - In 2009, the weekly average of hearing-ready appellants was 59. For Q4-2010, the weekly average of hearing-ready appellants is 56. This figure excludes cases reactivated from inactive status.
- Dispositions numbered 1,032. This includes 324 dispositions in the pre-hearing areas resulting from dispute-resolution (ADR) efforts and 708 after-hearing dispositions; of the after-hearing dispositions, 687 followed from Tribunal decisions.
- At the end of Q4-2010, the inactive inventory was 3,158 cases (at the end of Q3-2010, the inactive inventory was 3,215 cases).
- In Q4-2010, 86% of final decisions were released within 120 days. In 2009, 85% of final decisions were released within 120 days. Overall in 2010, 86% of final decisions were released in 120 days.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the fourth quarter of 2010, the notice inventory included 1,317 dormant cases, the active inventory totalled 3,869 cases and the inactive inventory totalled 3,158 cases.

## Production Charts

### A. Active Inventory

| Period  | Active Inventory |
|---------|------------------|
| Q2-2008 | 4227             |
| Q3-2008 | 4047             |
| Q4-2008 | 4008             |
| Q1-2009 | 3914             |
| Q2-2009 | 3842             |
| Q3-2009 | 3909             |
| Q4-2009 | 3831             |
| Q1-2010 | 3865             |
| Q2-2010 | 3862             |
| Q3-2010 | 3876             |
| Q4-2010 | 3869             |

### B. Incoming Appeals

| Period  | Incoming Appeals |
|---------|------------------|
| Q2-2008 | 920              |
| Q3-2008 | 832              |
| Q4-2008 | 969              |
| Q1-2009 | 1002             |
| Q2-2009 | 992              |
| Q3-2009 | 957              |
| Q4-2009 | 945              |
| Q1-2010 | 1036             |
| Q2-2010 | 1022             |
| Q3-2010 | 998              |
| Q4-2010 | 1007             |

### C. Dispositions

| Period  | Dispositions – total | Pre-hearing | After Hearing |
|---------|----------------------|-------------|---------------|
| Q2-2008 | 1213                 | 375         | 838           |
| Q3-2008 | 1025                 | 299         | 726           |
| Q4-2008 | 1028                 | 267         | 761           |
| Q1-2009 | 1056                 | 347         | 709           |
| Q2-2009 | 997                  | 341         | 656           |
| Q3-2009 | 970                  | 337         | 633           |
| Q4-2009 | 1060                 | 367         | 693           |

|         |      |     |     |
|---------|------|-----|-----|
| Q1-2010 | 1018 | 326 | 692 |
| Q2-2010 | 943  | 319 | 624 |
| Q3-2010 | 916  | 313 | 603 |
| Q4-2010 | 1032 | 324 | 708 |

#### D. Inactive Inventory

| Period  | Inactive Inventory |
|---------|--------------------|
| Q2-2008 | 4086               |
| Q3-2008 | 4060               |
| Q4-2008 | 3818               |
| Q1-2009 | 3697               |
| Q2-2009 | 3594               |
| Q3-2009 | 3481               |
| Q4-2009 | 3390               |
| Q1-2010 | 3321               |
| Q2-2010 | 3274               |
| Q3-2010 | 3215               |
| Q4-2010 | 3158               |

#### E. Notice of Appeal (Dormant cases)

| Period  | Total Dormant | Change from previous quarter |
|---------|---------------|------------------------------|
| Q2-2008 | 1245          | 12                           |
| Q3-2008 | 1232          | -13                          |
| Q4-2008 | 1212          | -20                          |
| Q1-2009 | 1251          | 39                           |
| Q2-2009 | 1318          | 67                           |
| Q3-2009 | 1238          | -80                          |
| Q4-2009 | 1201          | -37                          |
| Q1-2010 | 1185          | -16                          |
| Q2-2010 | 1267          | 82                           |
| Q3-2010 | 1335          | 68                           |
| Q4-2010 | 1317          | -18                          |

## Judicial Review Activity

### Fourth Quarter 2010

The status of applications for judicial review involving the Tribunal for the fourth quarter of 2010 is set out below. Only those judicial reviews where there was some significant activity during the quarter are listed. Most applications for judicial review are handled by General Counsel and the lawyers in the Tribunal Counsel Office.

#### 1. Decisions Nos.893/06 (October 12, 2006) and 893/06R (November 15, 2007)

The worker's short term earnings were calculated based on his earnings of \$25.00 an hour, with no deductions, at the time of the injury. His average earnings were reduced after 13 weeks, at which point they were based on the worker's earnings over the prior 24 months as reported to the Canada Revenue Agency through his income tax returns. The worker appealed to the Tribunal, alleging that his earnings should continue to be based on \$25.00 an hour.

The Vice-Chair denied the appeal. He found the worker to be a "non-permanent employee" within the meaning of Board policy, and it was appropriate to apply Board policy to recalculate the earnings after 13 weeks to reflect average earnings. The Vice-Chair held that the income tax records of the worker identified the true nature of the earnings of the worker. The same Vice-Chair denied the worker's application for reconsideration.

The worker retained counsel and commenced an application for judicial review. The Tribunal filed its Record of Proceedings. The worker then discharged his lawyer. The worker filed his own factum and a certificate of perfection. The judicial review was originally scheduled to be heard in June 2010, but due to a scheduling issue at the Ottawa Divisional Court the proposed date was changed to November 9.

The judicial review was heard before Justices Beaudoin, Annis and Swinton. This was the first judicial WSIAT judicial review ever conducted in French. The Court released its decision on November 12, unanimously dismissing the judicial review. The Court noted the reasonableness standard of review, and confirmed that it was reasonable for the Tribunal to rely on the information from Revenue Canada in coming to its conclusion.

#### 2. Decisions Nos.1110/071 (May 16, 2007), 1110/07 (September 12, 2008) and 1110/07R (March 10, 2009)

The worker appealed for entitlement for interstitial lung disease and for polymyocitis, which she alleged were conditions that resulted from her workplace exposure as a nurse. The Tribunal Vice-Chair sought the opinion of a Tribunal assessor, who was a respirologist with expertise in interstitial lung disease. The Vice-Chair reviewed the medical evidence and concluded that while an association with work was possible, on the balance of probabilities it was not likely that her condition arose from work and more likely it was idiopathic in origin.

The worker commenced an application for judicial review. The Tribunal served its Record of Proceedings. Over five months after the judicial review was commenced, the worker served the Tribunal with her Record and Factum. Given the delay in serving the Tribunal, the worker requested the Tribunal's consent to an order allowing an extension of time to file her Record and Factum with the Divisional Court. The Tribunal consented to the order. The Tribunal also agreed to file its factum within 30 days of the order.

The worker included two new affidavits in her materials that were not part of the Tribunal's Record. The Tribunal brought a motion to have the affidavits struck at the same time the judicial review was scheduled to be heard on December 8<sup>th</sup>. Shortly before December 8th the worker's counsel consented to an order to remove the affidavits.

The judicial review was heard by the Panel of Justices Molloy, Jennings and Daley. On December 10, 2010, the Court unanimously dismissed the judicial review on the grounds that the Tribunal's decision was reasonable. The Court held that the Tribunal Vice-Chair provided clear and compelling reasons for her assessment of the medical evidence. The Court also did not agree with the worker's argument that the Vice-Chair had abdicated her decision-making responsibility to the assessor, as the assessor's report was only one piece of evidence which the Vice-Chair considered, and the Vice-Chair was not bound to accept the assessor's opinion.

**3. Decision No.1766/09 (September 29, 2009)**

The Board denied the worker entitlement for chronic pain and LOE benefits after July 2001. Her appeal to the Tribunal was granted. The Vice-Chair held that the worker had entitlement for chronic pain, entitlement to partial wage loss benefits from April 2001 to June 27, 2002, and full LOE benefits from June 27, 2004 to August 23, 2004. The Board was directed to determine if there was ongoing LOE entitlement after August 23, 2004.

The employer served an application for judicial review in December 2009. The Tribunal noted that the worker had not been named as a party in the application. Following discussions, the applicant's counsel took steps to add the worker as a party. The Tribunal then filed its Record. The worker was a co-respondent with the Tribunal.

All parties filed their factums. The judicial review was scheduled to be heard in Toronto on November 17. However, two weeks prior to the hearing date the employer sought to abandon the judicial review. Given the late date on which the employer sought to abandon the application, the Tribunal agreed to consent to the abandonment providing the employer paid costs. The judicial review has now been abandoned.

**4. Decisions Nos.832/04 (November 18, 2004) and 832/04R (April 5, 2007)**

The worker left work due to back pain. Two weeks later the worker alleged the pain was due to an injury at work. The Board denied entitlement on the grounds it was not shown that an accident occurred in the course of employment.

The worker's appeal to the Tribunal was denied. The Vice-Chair noted the worker had a pre-existing non-compensable back condition, and there was an absence of any medical evidence supporting the position that the back condition was caused by disablement from the nature of the work. The worker's alternative explanation that there was an accident involving carrying a ladder was not supported by the evidence.

The worker commenced an application for judicial review. The worker included with her application an affidavit alleging that comments made by the Vice-Chair prior to the hearing raise an apprehension of bias.

This French language judicial review was scheduled to be heard in Ottawa during the week of November 8, 2010 but was adjourned due to an illness in the family of counsel for the applicant. A new date has not yet been set.

#### **5. Decisions Nos.1007/08 (May 9, 2008) and 1007/08R (October 20, 2008)**

The worker, a police officer, was granted entitlement for a neck and back/shoulder injury in 1975. In 1979 he suffered injuries to his chest, neck, upper back and left shoulder, for which he was granted a 10% permanent disability award. He injured his low back in 1986, for which he was granted two weeks of benefits. In 1999 an ARO granted the worker entitlement for a stomach ulcer caused by his pain medication, but denied ongoing entitlement for his low back from the 1986 injury. In a 2003 ARO decision the worker was denied an increase to his 10% pension. In a 2006 ARO decision the worker was denied ongoing entitlement for his shoulder and neck from the 1975 accident, a permanent disability award arising from that accident, and also denied a pension assessment for his ulcer.

The worker appealed to the Tribunal for:

- 1) ongoing entitlement and a pension assessment for the 1975 left shoulder and neck injury;
- 2) entitlement to a pension assessment for a stomach ulcer and stomach surgery from the 1979 injury;
- 3) a pension award for neck and shoulder injury under the 1979 injury;
- 4) an increase in the 10% pension award for his back and shoulder from the 1979 injury;
- 5) a pension assessment for a back condition from the 1986 injury.

The worker's appeal was denied. The Vice-Chair found that there was no ongoing entitlement for a shoulder and neck injury, and no entitlement for a pension assessment from the 1975 accident. The medical evidence indicated there were no ongoing problems that were related to this accident.

Similarly there was no entitlement to a pension for the worker's stomach ulcer or stomach surgery from the 1979 accident because there was no ongoing disability related to his stomach. There was no entitlement for a pension for his neck and left shoulder because there was no objective evidence of an organic impairment. The 10% award for the thoracic spine and infrascapular left shoulder remained appropriate as it reflected the worker's level of disability.

The Vice-Chair also held there was no ongoing entitlement for the 1986 accident, and hence no pension assessment was in order.

The worker's application for reconsideration was denied.

The worker commenced an application for judicial review, arguing all above issues except for issue #2. The respondent employer police department is participating as a co-respondent with the Tribunal.

All parties have filed their materials. The employer has also requested that the Court dismiss the judicial review on the grounds of delay. The judicial review will be heard in February 2011.

**6. Decisions Nos.565/09 (December 8, 2009) and 565/09R (March 9, 2010)**

In this right to sue case, a husband and wife shared driving duties in a transport truck. The wife was involved in a single vehicle accident. She and her husband were both injured, her husband sustaining severe injuries. Two insurance companies both brought section 31 applications for declarations that the husband and wife had their right to sue taken away under the Act. The husband had died by the time of the Tribunal hearing and his estate was a respondent. His wife was the other respondent.

The Vice-Chair found the right of action of both husband and wife was taken away, as they were both workers employed by a Schedule 1 employer and in the course of employment at the time of the accident. The husband's application for reconsideration was denied.

The husband's estate commenced an application for judicial review of the Tribunal's decisions. The Tribunal and one insurance company are co-respondents. There is some uncertainty about whether the wife and the other insurance company will be parties in the judicial review. The Tribunal and the insurance company have filed responding factums. The judicial review will be heard in Sudbury in March 2011.

**7. Decisions Nos.774/09 (April 21, 2009) and 774/09R (August 20, 2009)**

The plaintiff was the manager of an apartment building. His regular hours were 8 to 5, Monday to Friday, but he was on call outside of those hours. As a result of a flood in the parking garage, a plumber was called. The following day, while checking to see if the flooding problem was over, the plaintiff fell and injured himself.

Although the plaintiff at first claimed benefits from the Board, he subsequently decided to bring an action. The defendant commenced a section 31 application to determine whether the right of action was taken away under the Act.

The Vice-Chair held the right of action was taken away. Although the plaintiff was not scheduled to be on duty at the time of the accident, he was a worker in the course of his employment when the accident occurred. He fell within the requirements for "time, place and activity" in Board policy. When he checked the flooding situation this was consistent with his workplace practices, which involved coming back on duty whenever there was a situation requiring him to perform his job duties.

The plaintiff commenced an application for judicial review. Plaintiff's counsel originally filed an affidavit with their materials. Following negotiations between counsel, it was

agreed to remove the affidavit. At the end of the year, the Tribunal was preparing a responding factum.

**8. Decisions Nos.717/08 (April 30, 2008) and 717/08R (October 23, 2008)**

This is another French language judicial review to be heard in Ottawa.

The worker appealed to the Tribunal for an increase to his long term earnings basis from May 2000 to January 2003. He also appealed the Board's finding that a suitable employment or business (SEB) for the worker would be a mail and message distribution occupation, as this finding had resulted in a reduction to his loss of earnings benefits. The Panel allowed the worker's appeal, directing the Board to recalculate the worker's long term average earnings from May 2000 to January 2003, finding the SEB was not appropriate, and that his loss of earnings benefits should be based on a higher hourly wage.

However, the worker requested a reconsideration of the Tribunal decision, alleging the calculation of his long term earnings should have been higher, the Panel should have made the actual calculations rather than referring this to the Board, his short term earnings should have been higher, and taking issue with some procedural rulings made by the Panel during his hearing.

In the reconsideration decision, the same Vice-Chair, sitting alone, denied the request for reconsideration. She found that the relevant law and policy had been applied to determine the time periods on which the calculation of long-term earnings should be based. She found no error in referring the calculation of earnings to the Board. Further, the Tribunal had no jurisdiction to make findings on short term earnings because there was no final decision of the Board on that issue. She did not accept that the procedural allegations of the worker had any impact on the Panel's decision.

The worker, who is representing himself, first attempted to commence an appeal of the Tribunal's decision. Subsequently the worker retained counsel, who started an application for judicial review. The worker's counsel advised that she was revising the materials filed with the Court, but her application materials became muddled. The Ottawa Divisional Court had set a date for February 17, 2010, requiring the Tribunal to retain outside counsel in Ottawa to assist in bringing a motion for an order adjourning the judicial review and extending the time for filing a Record and factums.

Counsel for the worker failed to abide by times indicated in the consent order to serve and file her materials. Through another apparent error the Ottawa Divisional Court scheduled the judicial review to be heard during the week of November 8. The Tribunal was again required to retain outside counsel in Ottawa to resolve this matter. As a result of further representations to the Administrative Judge for the Ottawa Divisional Court, it was ordered that the judicial review not go ahead during the week of November 8, and that further materials can be filed on behalf of the worker only with the prior approval of the Divisional Court. At the end of the year no further materials had been filed by the worker.

**9. Decisions Nos.1248/98 (November 13, 2003) and 1248/98R (October 11, 2007)**

The worker appealed for entitlement to benefits for his injuries to his head, eyes, spine, chest, and ribs that the worker related to an accident in March 1993. The worker also sought payment of temporary total disability benefits after June 25, 1993. The hearing took place over four days, starting in August 1998 and concluding in July 2003.

The Panel had concerns about the worker's credibility. The Panel did not accept the worker's version of the accident, or that he suffered the injuries he alleged were caused by the accident. The Panel also found that any injuries suffered by the worker had resolved by June 25, 1993.

The worker commenced an application for judicial review. He is self-represented. The Tribunal filed its Record of Proceedings. The worker refused to pay for the hearing transcripts he ordered, or to file a factum. As a result of telephone calls which the worker made to Tribunal staff, the Tribunal is not currently accepting further telephone calls from the worker.

The worker asked the Divisional Court for an extension of time in which to perfect his judicial review application. The Tribunal and the employer (the Tribunal's co-respondent) took no position on the request. The Court granted the request and the worker had until the end of June 2009 to perfect the judicial review application. He failed to perfect in time. In March 2010 the worker served the Tribunal with a Notice of Abandonment.

The next day the Tribunal was advised by the Divisional Court Office that the worker had changed his name, and filed a new judicial review application. The new application was the same as the one he had just abandoned, except that the worker now identified himself under his new name.

The employer indicated that it would bring a motion to strike the worker's new judicial review application. The Tribunal advised it would support that motion. As the worker indicated he was not available until November 2010, the motion was scheduled to be heard on November 10, 2010. In July 2010, the worker served a handwritten Notice of Abandonment of his latest judicial review, but despite repeated requests by both respondents he has failed to file it with the Divisional Court. In early November 2010, the co-respondent withdrew its motion to give the worker more time to file his Notice of Abandonment. In late November 2010, the co-respondent wrote to the worker to request that he file his Notice of Abandonment immediately or provide his availability over the next three months to have the motion heard. To date, the worker has not responded.

The Divisional Court is scheduled to dismiss the application administratively in March 2011 if it is not perfected by that time.

**10. Decisions Nos. 1509/02 (February 2, 2004) and 1509/02R (September 27, 2006); 2021/07E (October 30, 2007) and 2021/07ER (July 22, 2009)**

Two sisters were suspended at the same time for smoking in a non-smoking area at work in 1999. Sister #1 reported an accident within a few hours of returning after her suspension. Sister #2 reported an accident later that day, before the suspension took effect.

Sister #1's claim was denied by the Board. Her appeal to the Tribunal was dismissed (Decision 1384/03). She brought an application for judicial review. On April 6, 2005 the Divisional Court unanimously dismissed the application for judicial review. The Court stated "In our view, the Tribunal carefully reviewed the evidence and gave reasons for its decision. The decision it reached on the basis of the evidence was not patently unreasonable."

However, Sister #2's claim had been allowed by the Board. The employer appealed to the Tribunal. A Panel of the Tribunal allowed the employer's appeal, reversing initial entitlement for the worker (Decision 1509/02). Sister #2 commenced an application for judicial review in April 2004.

Following discussions with her former counsel, in November 2002 it was agreed that the judicial review application would be adjourned to allow the worker to pursue an application to reconsider Decision 1509/02.

In her reconsideration application the worker alleged the Panel had failed to consider that she had suffered a recurrence of a 1992 injury. Decision 1509/02R was released on September 27, 2006. In that decision the Tribunal found that although the worker had raised a cross-appeal in Decision 1509/02, the worker had not raised entitlement on the basis of a recurrence of the 1992 injury as an issue in that cross-appeal. Consequently, there was no error in Decision 1509/02 and the application for reconsideration was denied.

However, the Vice-Chair in Decision 1509/02R noted that it was still open to the worker to bring an appeal on the recurrence issue to the Tribunal, though it would be necessary to make an application to extend the time to appeal that issue.

The worker retained new counsel, and commenced an application to extend the time to appeal the Board decision. In Decision 2021/07E, the worker's application to extend the time to appeal the issue of recurrence in the June 4, 2001 ARO decision was denied.

The worker commenced an application to reconsider Decision 2021/07E. In Decision 2021/07ER, released July 22, 2009, the Tribunal allowed the reconsideration and granted an extension of time to appeal the recurrence aspect of the ARO Decision.

The Tribunal hearing on the recurrence was heard in October, and Decision 2021/07I was released on December 13, 2010. This decision granted the worker's appeal on the basis that her pain in 1999 was a recurrence of the 1992 injury. The worker was given four weeks to decide whether to also ask the Tribunal to address the period of entitlement for benefits for the recurrence.

The judicial review remains adjourned pending the final resolution of the Tribunal appeal.

**11. Decisions Nos.1976/99I (November 30, 1999), 1976/99 (December 12, 2002) and 1976/99R (September 2, 2005)**

The worker was granted entitlement on an aggravation basis for benefits from March 1991 until February 1992. The worker did not seek medical treatment from November 1991 until September 2004. The hearing Panel found the worker was suffering from regional myofascial pain, rather than fibromyalgia.

The Vice-Chair in the reconsideration decision held the hearing Panel may have been mistaken in making this determination, and also that this distinction in diagnosis was not sufficient to disqualify the worker from entitlement. However, he also held that even if the worker suffered from fibromyalgia, she would still not be entitled to benefits because it was not clear the worker suffered from a work injury, the medical reporting did not relate her condition to work, there was significant discrepancy in the medical reporting, and her allegation of significant worsening from 1991 to 1994 suggests another intervening cause of her disability.

The worker commenced an application for judicial review. However, she was represented by a paralegal from Quebec, who would not have the status to represent her at Divisional Court. The Tribunal served its Record of Proceedings. The worker served her factum. However, her factum is improper and in the Tribunal's view should not have been accepted by the Ottawa Divisional Court. On October 12, 2010 Justice Lihares deSousa directed that the worker's factum be returned to the worker, with instructions that the worker must seek authorization before a single justice of Divisional Court to file such a factum. At the end of the year, the Tribunal had not received a revised factum or any indication that the worker had made an appointment with the Court.

**12. Decisions Nos.1233/08 (June 9, 2008), 1233/08R (May 29, 2009) and 1233/08R2 (April 6, 2010)**

The worker brought an appeal for initial entitlement for respiratory irritation from workplace exposure to paint odours. He was granted initial entitlement and loss of earnings benefits for a few weeks. His appeals for permanent impairment and for psychological entitlement for stress were denied. The worker made a request for reconsideration which was denied.

The worker commenced an application for judicial review. The Tribunal filed its Record of Proceedings and the worker filed his factum.

The Tribunal then determined that it should reconsider its decisions on its own motion. The worker's counsel agreed to place the judicial review on hold pending the outcome of the Tribunal's reconsideration.

The Tribunal released its reconsideration decision, Decision 1233/08R2. That decision found that the worker had not been given a full opportunity at the Tribunal to make submissions on the duration of benefits. The Tribunal's decisions were varied to have the matter of the duration of benefits remitted to the Board, subject to the parties' usual appeal rights.

A decision of the Board then confirmed the same few weeks of benefits. The worker's lawyer wrote to the Tribunal and suggested that he might revive the judicial review, but the Tribunal pointed out that that would be premature. It is expected that the worker will appeal the Board's decision. The judicial review is still on hold pending the worker's appeal.

**13. Decision No.2305/08 (November 18, 2008)**

The worker's appeal to the Tribunal for entitlement on the grounds she sustained a new injury, or aggravated a pre-existing condition at work, was denied. The worker commenced a judicial review alleging that the interpreter at the hearing did not properly interpret the proceedings for the Applicant.

The Tribunal filed its factum. The worker, who is self-represented, had originally demanded an early date for the judicial review. However, a considerable period of time has now gone by without the worker confirming that she is available for a hearing. In the final quarter, the Tribunal was contacted by a lawyer who is now representing the worker, in regard to commencing a reconsideration application. The Tribunal is waiting for the lawyer to advise on the worker's intention in regard to the judicial review application.

**14. Decisions Nos.756/89L (December 11, 1989) and 756/89LR (October 3, 1990)**

In Decision 756/89L, the worker applied for leave to appeal a decision of the old WCB Appeal Board dated November 27, 1978. The Appeal Board decision denied the worker entitlement to benefits for a bilateral knee disability, which he claimed was related to a work accident in 1977. The Appeal Board did not accept that the worker had an accident as he alleged. The Appeal Board denied the worker's reconsideration requests on December 14, 1979; August 15, 1980; October 27, 1983 and September 5, 1984. Two reviews of the worker's file by the Ombudsman did not support that the worker's disability was related to a work accident.

Applying the statutory tests, in its December 1989 decision the Tribunal Panel denied leave, holding there was no substantial new evidence, and there was no reason to doubt the correctness of the Appeal Board's decision.

The worker applied to reconsider Decision 756/89L. The same Panel released Decision 756/89LR on October 3, 1990, which denied the reconsideration.

Over the succeeding twenty years, the worker made a series of further applications for reconsideration. In October of 2010, he commenced an application for judicial review.

The Tribunal is attempting to file a complete Record of Proceedings with the Divisional Court. At the end of 2010, the Tribunal was making its best efforts to obtain missing documentation for the Record.

## **Recent Decisions**

### **Fourth Quarter 2010**

#### **Volunteer Firefighters**

*Decision No. 1936/10* found that volunteer firefighting was concurrent employment for the purposes of determining LOE entitlement when the firefighter was injured in his regular employment. In this case, the worker was seeking entitlement for lost shifts in his employment as a volunteer firefighter.

The Vice-Chair noted section 78(3) of the *Workplace Safety and Insurance Act* (WSIA) which provides that a statement of a municipal volunteer fire brigade must set out the amount of earnings to be attributed to each member of the brigade. The Vice-Chair also noted OPM Document No. 12-04-02 "Volunteer Forces," which applied to the calculation of average earnings for workers who were injured in the course of volunteer duties.

The Vice-Chair concluded that the Act allows for the inclusion of concurrent earnings as a volunteer firefighter in the determination of a worker's average earnings under section 53 of the WSIA. OPM Document No. 12-04-02 did not apply to workers injured in the course of their actual employment, as was the case here. The income the worker received from his volunteer duties, however, met the policy requirements of OPM Document No. 18-02-05 "Determining Average Earnings - Concurrent Employment." The worker's earnings as a volunteer firefighter, therefore, should be included in the calculation of average earnings, in accordance with the provisions of section 53 of the Act and OPM Document No. 18-02-05.

#### **Definition of "Learner"**

*Decision No. 2210/10* addressed the definition of "learner" under the WSIA as compared with the pre-1997 *Workers' Compensation Act*. Under the pre-1997 *Workers' Compensation Act*, a "learner" must be engaged in training or probationary work "specified or stipulated by the employer as a preliminary to employment." This requirement, however, was no longer found in the definition in the WSIA.

The Vice-Chair found that to interpret the definition of a learner as requiring the potential of future employment was to incorporate a component that was specifically removed by the drafters of the WSIA. The legislation provides only two requirements to the definition of a learner: first, there must be exposure to the hazards of an industry; and second, the exposure must be for the purpose of undergoing training or probationary work. There was no requirement that the training or probationary work must entail the prospect of employment.

#### **Jurisdiction: Second NEL Assessments under Section 47(8)**

*Decision No. 2023/10* held that the Tribunal does not have jurisdiction over a Board request that a worker undergo a second NEL assessment under section 47(8) of WSIA. In coming to her conclusions, the Vice-Chair commented on the interpretation of section 123 of the WSIA which defines the Tribunal's jurisdiction.

The Vice-Chair accepted the general proposition that the Board cannot limit the Tribunal's jurisdiction through policy statements, as held in *Decision No. 2105/01*. Although s. 123(2) does not explicitly exclude decisions under s. 47(8), sections 123(1) and (2) must be read together. Section 123(1) does not state that the Tribunal has jurisdiction over all decisions not excluded by s. 123(2); rather, it provides for jurisdiction over "final decisions" with respect to specified matters.

The Vice-Chair found that the request for a second NEL assessment, while it could affect a NEL award, was not a "final decision" on "entitlement to other benefits under the insurance plan" pursuant to s. 123(1)(a), as it did not end the worker's entitlement to benefits. Referring to *Decision No. 657/05*, as well as section 47(2)(a), the Vice-Chair noted that the NEL determination may be made using plural assessments and it is possible that the Board will rely on the first assessment in making its determination.

### **Right to Sue Applications: Declarations Under Section 29 WSIA**

*Decision No. 518/10* found that a declaration under section 29(3) and (4) of the WSIA that no damages, contribution or indemnity were recoverable from parties covered under the section, did not extend to a right of action in breach of contract.

The civil action was brought by a security guard at the regional office of a federal ministry for a slip and fall injury. The action was brought against the Attorney General of Canada, which brought third party proceedings against the company that owned the building. The building owner brought fourth party proceedings against the company with which it contracted for janitorial services.

The Attorney General was not a Schedule 1 employer. Accordingly, the right of action against the Attorney General was not taken away by section 29 of the Act. No damages, contribution or indemnity, therefore, were recoverable against the building owner or janitorial service, which were Schedule 1 employers.

This declaration, however, did not extend to the action of the Attorney General against the building owner for breach of a contractual obligation to include the Attorney General as a named insured in its insurance policy with respect to the premises. The damages allegedly suffered by the Attorney General as a result of this breach did not arise because of any negligent acts of the building owner. Rather, they arose because of the owner's failure to maintain insurance on the premises in the name of the Attorney General. The Vice-Chair noted Tribunal decisions such as *Decisions Nos. 36/00* and *237/03R*, which have recognized that there may be causes of action that are interrelated with the facts of a workplace insurance claim, but which are not actions that are with respect to the fault or negligence of the parties as it relates to the accident giving rise to the workplace insurance claim.

The right of action by the Attorney General of Canada against the building owner, therefore, was not taken away, and the building owner was not entitled to a declaration under section 29(4) in respect of the alleged breaches of contract.

### **Departure Fees**

*Decision No. 1637/10* dismissed the employer's appeal respecting a \$54,000 departure fee charged to it by the Board. The employer, which operated a camp, was in a non-compulsory

classification unit but chose voluntary coverage. The Vice-Chair found that the departure fee was in accordance with Board policy, referring to OPM Document No. 12-01-02. The Vice-Chair found that the fact that the employer ran a seasonal operation was not relevant. The Board's premiums are based on total earnings, not number of workers. Also the need to purchase additional insurance was not germane, as many employers have workplace insurance coverage as well as private insurance coverage. In a for-profit business, an employer had the opportunity to make profit and must run the risk of financial setbacks. The Panel distinguished *Decision No. 3198/00*, as the employer in that case was a not-for-profit employer, which was not the case with the employer in this appeal.

The Vice-Chair also noted the merits and justice provisions set out in section 119(1) of the Act as well as OPM Document No. 11-01-03. Referring to *Decision No. 2407/06I*, the Vice-Chair pointed out that the merits and justice provision in the Act and Board policy is not to be applied so as to circumvent Board policy. Rather, it is to be applied where circumstances are so exceptional that the strict application of the policy would lead to manifest unfairness or injustice.

WSIAT  
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